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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/625,503

07/22/2003

Randall J. Huebner

ACM 349

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EXAMINER

ARAJ, MICHAEL J

ART UNIT

PAPER NUMBER

3733

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DELIVERY MODE

08/20/2008

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/625,503	<b>Applicant(s)</b> HUEBNER ET AL.	
	<b>Examiner</b> MICHAEL J. ARAJ	<b>Art Unit</b> 3733	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 29 May 2008.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 41, 42, 44, 46-52, 54-60, 62-64, 96 and 99-156 is/are pending in the application.
- 4a) Of the above claim(s) 47, 54, 104, 110, 122, 128, 141 and 147 is/are withdrawn from consideration.
- 5) ☒ Claim(s) 41, 44, 46, 48-52, 55-60 and 62-64 is/are allowed.
- 6) ☒ Claim(s) 96, 99-103, 105-109, 111-121, 123-127, 129-140, 142-146 and 148-156 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                                   | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

## **DETAILED ACTION**

### ***Continued Examination Under 37 CFR 1.114***

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on May 29, 2008 has been entered.

### ***Election/Restrictions***

Newly submitted claims 104, 110, 122, 128, 141 and 147 are directed to an invention that is independent or distinct from the invention originally claimed for the following reasons: Based on the original election of species elected on April 11, 2006 claims 104, 122 and 141 do not read on the elected species of Figure 1.

Since applicant has received an action on the merits for the originally presented invention, this invention has been constructively elected by original presentation for prosecution on the merits. Accordingly, claims 104, 110, 122, 128, 141 and 147 are withdrawn from consideration as being directed to a non-elected invention. See 37 CFR 1.142(b) and MPEP § 821.03.

***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

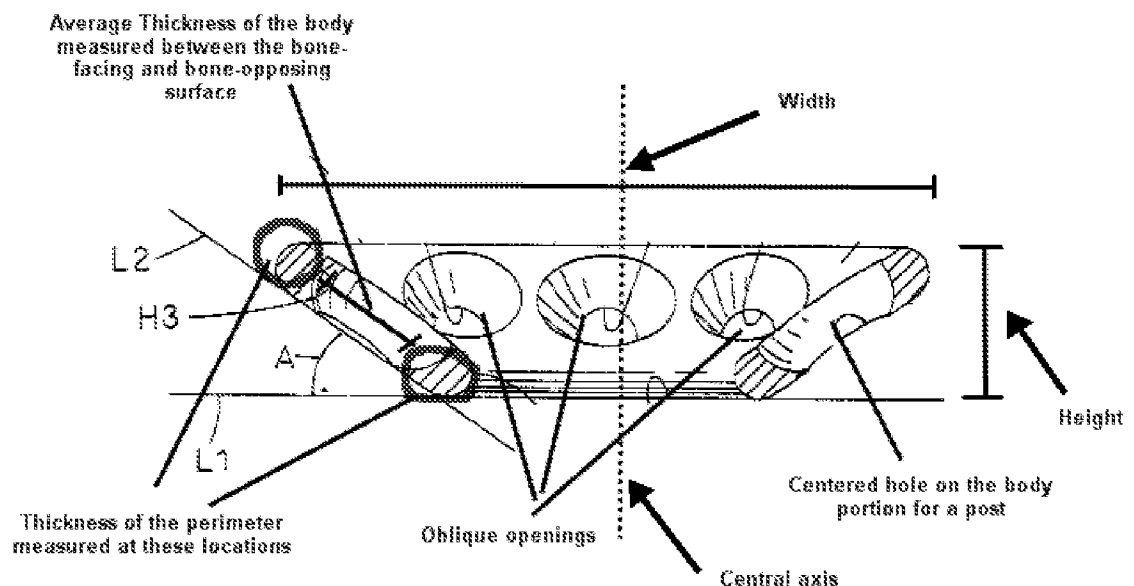
(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 96, 99, 100-102, 105, 107, 111, 115-120, 123, 125, 129, 132, 134-139, 142, 144, 148, 151 and 153-156 are rejected under 35 U.S.C. 102(b) as being anticipated by Weiss et al. (U.S. Patent No. 6,179,839).

Weiss et al. disclose a method of fusing at least two bones comprising selecting a bone plate (10) including a body portion with a bone-facing surface and further including a post (one of the fasteners are considered a post) extending from the bone-facing surface of the body portion (see Figure 1 below); placing the bone plate into a first and second cavity formed by at least two bones such that the post restricts movement of the body portion; and attaching the bone plate to the at least two bones using fasteners (F). The first and second portions of the cavity are formed in a single step, where the reaming will create a first cavity while a second cavity already exists from the gap between two bones. Therefore these two portions of the cavity are created in a single step. The post, which is separate from the plate, is implanted in between the two bones causing the part of the two bone surfaces adjacent to the post to cause recesses in both bones upon entry and is at least partially in a pre-existing gap/cavity between the at least two bones (see Fig. 1B). The post is substantially centered on the body portion between the top and bottom portions of the bone plate

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(see Figure 1 below). At one point the post extending from the bone-facing surface by a distance less than the height upon placement of the post. Also disclosed is a bone plate defining a central axis and a plurality of openings arranged around the central axis, wherein each of the plurality of openings defines an axis extending obliquely to the central axis, and wherein the step of attaching includes a step of placing bone screws through at least two of the plurality of openings. The perimeter and bone-opposing surface that opposes the bone-facing surface has a thickness greater than the average thickness of the body portion measured between the bone-facing and bone-opposing surfaces (See Figure 1 below). From the interpretation of this figure it is clear how Weiss et al. reads on this claim limitation. The body portion has a width and a height, where the height is about one-fifth the width of the bone plate.



**Figure 1 (Modified from '839)**

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 103, 108, 109, 114, 121, 126, 127, 131, 133, 140, 145, 146, 150 and 152 are rejected under 35 U.S.C. 103(a) as being unpatentable over Weiss et al. (U.S. Patent No. 6,179,839).

Weiss et al. disclose the claimed invention except for the bone-facing surface being convex and corresponding to a portion of a sphere, a bone-facing surface having a rough texture, and the body portion having at least one slot configured such that a bone screw can be placed at multiple positions along the slot. It would have been obvious to one skilled in the art at the time the invention was made to have these features placed into Weiss et al.'s apparatus because it is only a matter of design for these features. The threaded post will make device easier to use, the rough facing texture will prevent slippage of the plate prior to installing the fasteners, the slots will allow user manipulation for a better installation of the implant is only a matter of design choice.

Claims 105, 106, 124 and 143 are rejected under 35 U.S.C. 103(a) as being unpatentable over Weiss et al. (U.S. Patent No. 6,179,839) in view of Weaver et al. (U.S. Patent No. 6,623,486).

Weiss et al. disclose the claimed invention except for the post disposed in a threaded engagement with the body portion. Weaver et al. disclose a threaded screw hole for use with a fastener because it will create a high resistance to shear or torsional forces (Col. 1, Paragraph 6). In this interpretation, one of the fasteners of Weiss et al. are considered a post, therefore It would have been obvious to one skilled in the art at the time the invention was made to have created the device of Weiss et al. with threaded apertures in view of Weaver et al., in order to create a device that is resistant to shear and torsional forces.

Claims 112, 130 and 149 are rejected under 35 U.S.C. 103(a) as being unpatentable over Weiss et al. (U.S. Patent No. 6,179,839) in view of LeHuec et al. (U.S. Patent No. 6,793,658).

Weiss et al. disclose the claimed invention except for the bone plate including a cap configured to be attached to the body portion such that the cap obstructs out-of-bone movement of at least one of the fasteners after the at least one fasteners has attached the bone portion to bone. LeHuec et al. disclose a retaining element (32) that is attached to the plate to prevent the fasteners from coming out. It would have been obvious to one skilled in the art at the time the invention was made to have created the device of Weiss et al. with a cap in view of LeHuec et al., in order to prevent screws from being loosened and coming out of the body portion.

***Allowable Subject Matter***

Claims 41, 44, 46, 48-52, 55-60 and 62-64 are allowed.

***Response to Arguments***

Applicant's arguments with respect to claims 96, 99 and 100 have been considered but are moot in view of the new ground(s) of rejection.

***Conclusion***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to MICHAEL J. ARAJ whose telephone number is (571)272-5963. The examiner can normally be reached on M-F 8am-5pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Eduardo Robert can be reached on 571-272-4719. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.




Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Michael J Araj/  
Examiner, Art Unit 3733

/Eduardo C. Robert/

Supervisory Patent Examiner, Art Unit 3733

<div>Application Number</div> <div></div>	Application/Control No.	Applicant(s)/Patent under Reexamination	
	10/625,503	HUEBNER ET AL.	
	Examiner	Art Unit	
	MICHAEL J. ARAJ	3733	